SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES R. BLANCHARD, SR. and
WEST LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION, INC.
Petitioners,

V.

WILLIAMS INC., and ATCHAFALAYA
CRAWFISH CONSERVATION ASSOCIATION
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED FOR REVIEW

Does the right "to use the navigable waters of the United States", protected under the Public Trust Doctrine, the Organic Act for Admission, the 14th Amendment to the United States Constitution, the Commerce Clause, and other federal laws, include fishing?

PARTIES TO THE PROCEEDING

Charles R. Blanchard, an individual citizen of the United States of America;

West Louisiana Crawfish Producers Association, with no known parent or subsidiary companies;

Atchafalaya Crawfish Conservation Association, Inc., ("ACCA"), with no known parent or subsidiary companies;

Williams, Inc., ("Williams"), with no known parent or subsidiary companies.

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CITATION OF OPINION

Charles R. Blanchard, Sr. and West Louisiana Crawfish Producers Association, Inc. v. Williams, Inc. and Atchafalaya Crawfish Conservation Association, No. 95-31063, an unpublished opinion of the United States Court of Appeals for the Fifth Circuit, issued Sep. 12, 1996, See Appendix p.1-2.

BASIS FOR JURISDICTION

Judgment was entered in the United States Court of Appeal for the Fifth Circuit on September 12, 1996; Jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. 1254 (1).

PROVISIONS OF LAW

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of Admission of the State of Louisiana, (Act of February 20, 1811):

> [T]he river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico shall be common highways, and forever free, as well to the inhabitants of the said State, as to other citizens of the United States. (See Appendix for entirety of Act.)

Article 1, Section 8, Clause 3, Constitution of the United States ("Commerce Clause"):

> The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States....

33 U.S.C. 403 ("Rivers and Harbors Act").

The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited.... (See Appendix p. 24 for complete text.)

STATEMENT OF THE CASE

The plaintiffs and their ancestors have navigated and fished the "Atchafalaya Basin" of South Louisiana since time immemorial. Thirty to fifty percent of the water of the Mississippi flows through this Basin to the Gulf of Mexico. It is a vast water bottom, completely covered by more than three feet of water, mean depth, an average of 90 to 270 days a year. Lesser depths permeate the area for even greater periods and portions remain subaqueous throughout each year. Like the Everglades or the Rocky Mountains it is truly one of the last great natural wilderness areas in North America, largely untamed by roadways or utilities. Since the 1930's, the Basin has been incorporated into a system of levees and water control structures under the control and supervision of the United States Army Corps of Engineers. The plaintiffs enter the Basin in this federally supervised area, reach their fishing spots, and catch and remove crawfish, entirely by boat.

In 1990, Williams, Inc. and other subaqueous land owners conceived a plan to privately and exclusively regulate crawfishing in about 95,000 subaqueous acres claimed by them in the lower Atchafalaya Basin. According to this system, each of the landowners purportedly would lease their land to an association, the Atchafalaya Crawfish Conservation Association ("ACCA") to be formed by them to establish rules and regulations for "licensing" of fishermen in the area in question. ACCA would post and patrol the disputed area by boat. Notices of licensing requirements, fees, and enforcement

by prosecution would be posted at locations used by crawfisherman for obtaining supplies and selling crawfish. Fees payable to ACCA would be charged for licenses to crawfish in the area.

To enforce their plan, defendants sought assurance that noncompliant fishermen would be prosecuted through state authorities. A meeting was arranged with the local district attorney to secure his prior agreement to enforce any charges brought by the private agents of the defendants against crawfishermen such as the plaintiffs. Pursuant to their agreement with the district attorney, defendants initiated the plan, formed ACCA hired and equipped a boat mounted "ranger", and for approximately two years posted and patrolled the area as "private property", collecting license fees from many fishermen, warning unlicensed fishermen of potential prosecution, and filing trespass charges against repeat offenders. Some crawfishermen, such as Mr. Blanchard, discontinued fishing in the contested areas. Some purchased a license from ACCA. Others continued to crawfish in the contested areas without licenses despite the postings and warnings. True to his word, the District Attorney of Iberia Parish initiated prosecutions against several crawfishermen.

On May 21st, 1992 plaintiffs filed a complaint to secure their civil rights to fish in the navigable waters of the Basin expressly claimed under the federal common law, the Act of Admission, the Commerce Clause of the Constitution, the 14th Amendment, and the federal navigational servitude through a declaratory judgment pursuant to 42 U.S.C. §1983.

Jurisdiction was conferred upon the court of the first instance, the United States District Court for the Western District of Louisiana, because the action involved federal questions under the due process clause of the Fourteenth amendment and the Commerce Clause of the U.S. Constitution, Article 1, Section 8, Clause 3, the Civil Rights Act, 42 U.S.C., Sec. 1983 and 1988, Louisiana's Act of Admission (Act of Congress, April 8, 1812, 33 U.S.C. Sec. 10), and also as an Admiralty maritime tort matter. 28 U.S.C. Sec. 1331, 1333, 1337 and 1343.

The motion for summary judgment out of which the judgment now before this court arises was brought on September 20, 1994. Defendants originally denied the navigability of the areas in question and sought to defeat the plaintiffs' claims based upon the purported non-navigability of the area in question. Recognizing navigability as a factual issue which might preclude summary judgment, defendants also argued that the court lacked federal jurisdiction, alleging there was no federal right to navigate or fish in the areas in question, whether navigable or not. At oral argument, defendants realized that so long as the issue of navigability remained their motion was doomed. Accordingly, the navigability of the area in question was stipulated at both oral arguments.

On September 18th, 1995 the lower court issued a memorandum ruling and judgment dismissing the plaintiffs' claims concluding that there is no federally protected right to fish in the admittedly navigable areas. To reach this conclusion, the lower court erroneously defined the issue before it as the scope of the "federal navigational servitude" which "ha[d] not previously been addressed by any court". The district court also incorrectly stated that it was "without the guidance of

judicial precedence." (sic) The lower court constructed its own *res nova* rule that the "federal navigational servitude...does not extend to public fishery rights, a matter governed **solely** by state law," and that "public fishery rights...remain purely matters of state law." The court concluded that:

> ...as a matter of law there is no federal right under the Public Trust Doctrine to fish and navigate in the areas in dispute. Rather, those rights are dictated *solely* by state law and policy.

Finally, the court also held that:

> ...the Act for the Admission of Louisiana (Act of February 20, 1811, 33 U.S.C. 10) into the Union had no bearing on any federally protected rights asserted by the plaintiffs.

Plaintiffs appealed the judgment of the lower court to the United States Fifth Circuit Court of Appeals which affirmed with the simple statement that: "There is no reversible error."

ARGUMENT

Reason for Review

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit which, by *per curiam* opinion, decides an important federal question in a way that conflicts with many relevant decisions of this Court.

Seventeen years ago, in *Vaughn, et al vs. Vermilion Corporation*, 444 U.S. 206, 208 (1979), this Court reversed a state court permanent injunction prohibiting fishing in admittedly navigable but allegedly private water noting that it could not be said that the fishermen there had no defense "under federal law". In the instant case the Fifth Circuit's *per curiam* opinion affirms a District Court's dismissal of fishermen's claims under federal law to fish in admittedly navigable but allegedly private waters. The District Court's opinion is based on the conclusion, contrary to *Vaughn*, that there is "no federal right" involved. Therefore the Fifth Circuit's opinion in the instant case conflicts with the implicit holding of this Court in *Vaughn*, that the right to fish is a use of navigable waters protected "under federal law". It also conflicts with many explicit expressions of this Court in other opinions, as detailed below.

Fishing is a Protected use of Navigable Waters under the Public Trust Doctrine

The public has enjoyed the right to fish in public waters since the *Magna Carta*, wrested from King John in

1215, prohibited exclusive fisheries by directing that fenced rivers should be laid open. See *Ne-Bo-Shone Ass'n, Inc. v. Hogarth, et al*, 7 F.Supp. 885, 889 (W. D. Mich. 1934); *Magna Carta, 1215*, clauses 33, 47, 48; *Magna Carta*, 1224-25, Chapters 16 and 23. Under English common law it was understood that the Monarch held title to the waters of the sea and all lands below high water but that "their nature and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, *and for the purpose of fishing by all* the King's subjects". *Shively v. Bowlby,* 152 U.S. 1, 11 (1894). Although the King maintained title "this title, jus privatum, whether in the King or in a subject, [was] held subject to the public rights, jus publicum, of navigation *and fishing.* Id. at 13.

As explained by Justice Taney in *Martin, et al v. Waddell*, 16 Pet. 367, 411, 413 (1842), this concept of public fishing rights prevailed in the Colonies before the Revolution:

> [D]ominion and propriety in the navigable waters was a public trust for the benefit of the whole community, *to be freely used by all for navigation* and *fishery, as well for shellfish as floating fish."* (emphasis added)

The evolution of the thirteen original colonies into states did not diminish these public trust rights. *Smith v. Maryland,* 18 How. 71, 74, 59 U.S. 71 (1860), affirmed the right of the State of Maryland to protect an oyster fishery within its boundaries observing:

> Whatever soil below low water mark is the subject of exclusive propriety and ownership

> belongs to the state... But *this soil is held by the state,* not only *subject to,* but in some sense *in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish.* (emphasis added).

Smith v. Maryland, 59 U.S. 71, 75 also recognized that the state's power to regulate fisheries could only be used in preservation, not detraction, of the public rights, including fishing, for which the property is held in trust:

> The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and *may regulate the modes of that enjoyment so as to prevent the destruction of the fishery.* In other words, it may forbid all such acts as would render the public right less valuable or destroy it all together. This power results from...*its duty to preserve unimpaired those public uses....*" (emphasis added)

In addition to *Martin, et al v. Waddell* and *Smith v. Maryland,* many other cases recognize public trust protection of fishing rights.

Hardin v. Jordan, 140 U.S. 371, 381 (1891), recognized title to the shore and lands under tidewater as:

> incidental to the sovereignty of the state -- a portion of the royalties belonging thereto, and *held in trust for the public* purposes of navigation and *fishery.*

The most encyclopedic decision of early American public trust jurisprudence is *Shively v. Bowlby,* 152 U.S. 1 (1894). The *Shively* court noted that the public right of navigation and fishing, continuously held as *jus publicum* by the states had been preserved through the 1803 Treaty by which France ceded Louisiana, 152 U.S. 1 at 27, and the Acts for Admission of the State of Louisiana, 152 U.S. 1 at 35.

In *Illinois Central Railroad v. Illinois,* 146 U.S. 387, 452 (1892) this Court recognized that state ownership of lands covered by navigable waters included the right to use or dispose thereof only without substantial impairment of public trust rights, specifically including fishing:

> enjoy the navigation of waters, carry on commerce over them and have *the liberty of fishing* therein free from the obstruction or interference of private parties." (emphasis added)

Under *Illinois Central Railroad*, the inability of the state to abdicate this trust is not merely a matter of state, but also of federal law:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties...than it can abdicate its police powers in the administration of government and the preservation of peace. (Id. at 453, 13 S.Ct. at 118.)

Because the lower court failed to recognize that plaintiffs' rights to fish derive from the Public Trust Doctrine, it mischaracterized the issue in the first instance as "the scope of the federal navigational servitude."[1] But the Public Trust Doctrine, is not restricted to navigation or limited by the scope of the statutory navigational servitude.

This Court recognized this principle explicitly in *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 476 (1988):

> The states have interests in lands beneath tidal waters which have nothing to do with navigation. For example, this court has previously observed that public trust lands may be used for fishing for both "shell-fish [and] floating fish. See for example, *Smith v. Maryland,* 18 How. 71, 75.

The *Phillips* court further observed:

> It would be odd to acknowledge such diverse uses of public trust tidelands, and then to suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.

Phillips Petroleum therefore concluded that the Public Trust Doctrine conveyed *non-navigable* tidelands to the State of Mississippi. The *Phillips* court also noted that:

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1 The lower court also improperly restricted its consideration to the prosecution of those fishing only. This analysis did not address the rights of those who paid a fee to remain unprosecuted, or those who were deterred from entry altogether.

> [C]ases which have discussed the state's public trust interest in such lands described *uses of them not related to navigability such as* bathing, swimming, recreation, *fishing* and mineral development." 484 U.S. 469, 482.

Phillips establishes not only that the Public Trust Doctrine extends physically beyond the limits of navigability, but also that the functional breadth of the Public Trust Doctrine extends to uses not incidental to navigation, such as "for fishing, etc."

Therefore it was error for the lower court to assume that the public uses which flowed from the stipulation of navigability were limited to those incident to navigation. As recognized in *Ne-Bo-Shone Ass'n v. Hogarth*, 7 F.Supp. 885, 888-889 (W.D. Mich. 1934):

> It is to be noted that while navigability was made to guide as to what constituted public waters, it was not made the test of the scope of the public use of such waters.
>
> * * *
>
> Because some waters are public, certain rights attach thereto. These rights are not limited by the test by which the nature of the waters is determined but to the rights incident to the characterization as a public of the stream or body of water.
>
> * * *

> Here we are concerned only with the right to take fish. That this right has always been recognized as incident to a determination that the waters concerned are public in character and sustained by such a wealth of authority that citations are unnecessary.
>
> * * *
>
> It is the view of this court that this right to take fish is not a right incident to navigation but a right arising from the fact that the waters in which the right is claimed are public waters. Both rights arise from the fact that the waters are public, not private. The rights co-exist. Neither finds its source in the other.
>
> * * *
>
> In my opinion the right of fishing in public waters is common to the public subject only to the limitations of the statutes of the state relative to fishing.

Fishing is a Protected use of Navigable Waters under the Commerce Clause

Neither is the Commerce Clause of the Constitution limited, as the lower court suggested, to incidents of navigation. In *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-427, this Court plainly said as much:

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability. . .is but a part of this whole.

Article I, Section 8, Clause 3 of the Constitution gives to the United States jurisdiction of the surface of "navigable waters of the United States." *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L.Ed. 997 [1842]. See also *Harmon v. Chicago*, 147 U.S. 411, 15 S.Ct. 306, 37 L.Ed. 216, 1893.

Under the Commerce Clause, there simply arises, over navigable waters, a servitude in favor of the citizens of the United States generally, to navigate over and fish upon those waters. Pursuant to its Commerce Clause authority, Congress has passed 33 U.S.C. 403, which prohibits "any obstructions...to the navigable capacity of the waters of the United States...". This language does not exempt obstructions erected for the purpose of preventing fishing, and or limit its prohibition to physical obstructions. Certainly the posting and prosecution for trespass of persons who navigate and fish amounts to a violation of this statute.

The lower court's contention that Commerce Clause of the Constitution is to a servitude for navigation alone was expressly rejected by the Fifth Circuit in *Zabel v. Tabb*, 430 F.2d 199, 200 (5th Cir. 1970) which reversed a lower court holding, analogous to the instant holding, that the Corps of Engineers had no Commerce Clause power to deny dredge and fill permits upon "anything

except interference with navigation". In so holding, the Fifth Circuit held that Congress retained all of its powers under the Commerce Clause not specifically relinquished in the Submerged Lands Act. Id. at 205-206. Specifically, the Commerce Clause authorized the Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969, both of which were premised upon a congressional interest in the conservation of fisheries as a national resource. Judge Brown made several observations applicable here:

> The **waters**...are subject to the paramount servitude in the federal government which the Submerged Lands Act expressly reserved as an incident of power incident to the Commerce Clause. Id. at 215.

Fishing is a protected use of the navigable waters under the Organic Act of Admission

In addition to the Public Trust Doctrine and the Commerce Clause, the Organic Act for the Admission of Louisiana guaranteed that the waters of:

> the river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico ***shall be common highways and forever free***, as well to the inhabitants of the said state, as to other citizens of the United States.

The lower court's finding that the Act for Admission of Louisiana had "no bearing on any federally protected rights" was evidently based on its incorrect

observation that "this particular compact... has never been the subject of judicial scrutiny". The District Court failed to recognize the decision of this Court in *Shively, supra,* p. 10, the Fifth Circuit's decision in *New Orleans Steamship Ass'n v. Plaquemine's Port Harbor & Terminal District,* 874 F.2d 1019 (5th Cir. 1989) and the decision of the Louisiana Supreme Court in *Burns v. Crescent City Rod & Gun Club,* 41 So. 249 (La. 1906).[2]

In *Shively* and *Burns* the Supreme Courts of the United States and Louisiana, respectively, recognized that the Public Trust Doctrine was implemented, as to navigable waters, by the Act of Admission of the State of Louisiana. Both courts also recognized the public fishery right as one of the rights subject to the Public Trust. In *Shively* fishing was incidental but in *Burns* it was directly before the court.

In *New Orleans Steamship* Judge Wisdom interpreted the Act of Admission to "proscribe fees for the mere privilege of navigating through waters, or *imposts which create preferences for certain private parties over others."* 874 F.2d at 1024. *Shively, Burns* and *New Orleans Steamship* all have application to this case in which the defendants have posted waters to prohibit entry and conditioned fishing on the payment of a fee under threat of prosecution under state law for criminal trespass.

The lower court also overlooked the fact that language of the Organic Act for the Admission of Louisiana was derived from identical language in the Northwest Ordinance of 1787, which has been interpreted

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2 The Act of Admission had also been applied in the Western District of Louisiana. See *Wilder v. Placid Oil,* 611 F.Supp. 841, 847 (W.D. La. 1985).

many times to convey the right of fishing to the public. See *Nedtwig v. Wallace*, 208 N.W. 51, 53 (Mich. 1926); *Willow River Club v. Wade*, 76 N.W. 273, 276 (Wis. 1898); *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 123 (Mich.), *Ne-Bo Shone Ass'n, supra* at p. iv, v, 8, 11, 13, 14. Cf. *Shively v. Bowlby,* 152 U.S. 1, 33 (1893) discussed at pps. 10, 18 *supra.*

Had the Congress which passed the Northwest Ordinance, many of whom were also Framers, or the Act of Admission of the State of Louisiana, intended only the protection of commerce other than fishing, which was then such a "common liberty", *Smith v. Maryland*, 18 How. 71, 74 (59 U.S. 71, 75), it would be strange indeed. Such a strange emasculation of common rights could have stopped with the reference to common highways. There would then have been no need to describe the waters as "and forever free". Such a biblically broad injunction could hardly have been mere surplusage.

Whether or not public rights such as navigability or fishery exist in the waters of the United States or, to put it another way, whether the waters at issue are navigable and therefore public, is always and necessarily a federal question. As the Supreme Court observed in *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 22 (1935):

> The question as to the extent of this federal grant, ...is necessarily a federal question.... [I]t involves the ascertainment of the essential basis of a right asserted under federal law.

The Organic Act of Admission of Louisiana, like that of all other states or territories, is such a federal

grant, providing a federal right of action, even against State legislative activities which infringe upon federal rights. See e.g. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Com.*, 739 F.2d 1467 (9th Cir. Hawaii, 1984). *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 77 L.Ed. 903, 53 S.Ct. 447 (1933); See also *Gallardo v. Questll,* 29 F.2d 894 (1st Cir. Puerto Rico, 1928).

Fishing is a Protected use of the Navigable waters protected under the 14th Amendment

The right to fish in the navigable waters of the United States also received constitutional protection through the 14th Amendment passed in 1866 and ratified in 1868. Its second critical sentence began:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

This phrase was interpreted by the United States Supreme Court in *The Slaughterhouse Cases,* 16 Wall 36, 83 U.S. 36, 79 (1873) to include "rights of national citizenship" and among them was the right:

> [T]o use the navigable waters of the United States, however they may penetrate the territory of the several states.

As illustrated by the cases previously discussed, by 1866 the "**use**" of navigable waters already included the right to fish, separate and apart from the equally recognized right to navigate. Since the right to fish is constitutionally protected, at least by the 14th Amendment

after *The Slaughterhouse Cases*, it is among the rights "no state shall abridge".

The plaintiffs right to use navigable waters is also protected by the 14th Amendment's Equal Protection Clause. See *Russo v. Reed,* 93 F.Supp. 554 (District Court of Maryland, 1950); *Northern New Hampshire Lumber Co., v. New Hampshire Water Resources Board,* 56 F.Supp. 177 (District Court New Hampshire, 1944).

Fishing is Protected under this Court's Decision in Vaughn v. Vermilion Corporation

Plaintiffs also possess concomitant state rights pursuant to the Louisiana Constitution the Louisiana Civil Code, and other state laws. But the existence of these concomitant state rights, however, does not in any way detract from the historic and fundamentally federal nature of the right to fish under federal common law, preserved through the Public Trust Doctrine, the Organic Act of Admission, and the Commerce Clause, and recognized constitutionally as a "right of national citizenship" under the 14th Amendment.

Notwithstanding these fundamental principles of law, it must be acknowledged that these defendants have successfully prosecuted for trespass persons such as the plaintiffs who were crawfishing in areas very similar to that at issue here. See *State v. Barras,* 615 So.2d 285 (La. 1993). In that case, upon prompting by the same persons defendant here, and with the assistance of the same district attorney, the Louisiana Supreme Court dismissed a defense based upon the public right of navigation and fishing in the Atchafalaya Basin by characterizing the area

as a "backwater" and "flooded swamp lands". 615 So.2d at 288. As indicated in brief to the lower court, this decision is "simply not relevant in the summary judgment context" because it was based upon the determination, after trial, of a disputed issue of fact. (R.Vol.4,p.19).

More importantly, however, this court should take special note of the semantic legerdemain by which the *Barras* decision was rationalized. Undefined terms such as "backwater" or "flooded swamp land" have no logical or legal connection with the established principles for determination of navigability. Navigability, is in the first instance, a federal question, to be determined according to federal principles. Although state courts are certainly competent to make this determination, they cannot do so in a manner inconsistent with federal law. Characterizing the areas as "backwaters" or "flooded swamp land" should not defeat plaintiffs' fundamentally federal rights to navigate and fish in these public waters.

The *Barras* decision unfortunately represents the type of state abdication, albeit judicial, which was specifically disapproved in *Illinois Central Railroad*. In *Barras* these same defendants previously ensnared the Louisiana Supreme Court in their effort to ignore federal principle. *Barras* makes the present effort to vindicate plaintiffs' fundamentally federal rights in federal court crucial.

The Fifth Circuit's decision in the instant case, like the *Barras* decision, is also judicial abdication which ignores this Court's precedents, most recently embodied in *Vaughn*.

In *Vaughn v. Vermillion Corp.* 444 U.S. 206, 208 (1979), this Court reversed a Louisiana court's summary judgment prohibiting commercial fishermen from entering, through allegedly private canals, a "pre-existing natural system of navigable waterways". The operative point for the Court was that the right to use navigable waters is rooted in federal law:

> We do not think it can be said as a matter of law that if petitioners proved their factual allegations, that proof would not constitute a defense *under federal law.* (44 U.S. 206 at 208) (emphasis added).

In this case, navigability is stipulated and therefore plaintiffs' rights under both Federal and Louisiana law cannot be avoided by the *Barras* legerdemain. *Vaughn* establishes that plaintiffs here have a right to fish which "as a matter of law" may be asserted "under federal law".

In *Vaughn* this court acted on a writ, as a court of last resort, to save from denial by the Louisiana Supreme Court the identical fishing rights which are now, some seventeen years after *Vaugn*, inexplicably denied by the lower federal courts. Indeed, the State Court decisions in *Vaughn* and *Barras*, and this court's opinion in *Vaughn* are the very reason the present plaintiff's sought a federal forum. In the absence of a writ issued in this case, the outcome of any state court action is all too predictable, and the federal right to use the navigable waters to fish will regress to its death bed. Surely such a result cannot be justified in this day and age:

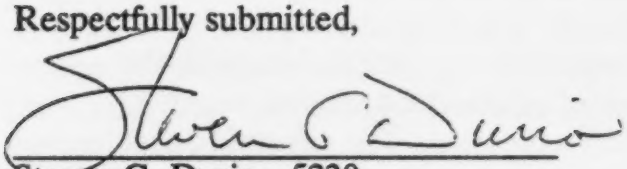
> Throughout the centuries, the oceans, lakes, rivers, and tributary streams

> have been highly useful to mankind, and, to a considerable degree, indispensable for fishing, travel and commerce. In modern times, not only are these resources used for various industrial enterprises, but, with the congestion of urban life, has come necessity for rest and recreation. The utilitarian uses of the waters have been broadened or supplanted to meet these other important needs. With increasing private ownership of lands bordering lakes and streams, the average citizen finds it difficult or impossible to provide himself and his family with opportunities for rest and play. There should, in these conditions, be no narrowing of rights hitherto recognized. The citizen ought not (for other than the most compelling reasons) to be deprived of those blessings which natures's bounty has provided.
>
> *Ne-Bo-Shone Ass'n, Inc. v. Hogarth, et al,* 7 F.Supp. 885, 889 (W. D. Mich. 1934.)

In *Vaughn* the fishermen were defendants in a injunction action; here they are plaintiffs, seeking to vindicate their federal rights in response to the concerted action of landowners and state officials to prosecute them for trespass. Though the roles of plaintiff and defendant are reversed, the situation and the issue are exactly the same, and therefore, as it did in *Vaughn*, this Court should recognize that the judgment below, which refused to recognize the plaintiffs' federal rights to navigate and fish

in public water, should be reviewed under writ and reversed.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31063

CHARLES R. BLANCHARD, SR.,
Plaintiff-Counter
Defendant-Appellant,

versus

WILLIAMS INC.;
Defendant-Counter Claimant
Appellee,

ATCHAFALAYA CRAWFISH CONSERVATION ASSOCIATION,
Defendant-Appellee,

versus

WEST LOUISIANA CRAWFISH PRODUCERS ASSOCATION, INC.,
Counter-Defendant-Appellant.

Appeal form the United States District Court
for the Western District of Louisiana

Before KING, JONES, and SMITH, Circuit Judges.

PER CURIAM:[1]

There is no reversible error. The judgment is AFFIRMED.

[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precident except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

CHARLES R. BLANCHARD, SR. and WEST LOUISIANA CRAWFISH PRODUCERS ASSOCIATION, INC.	CIVIL ACTION NO. 92-0941
VERSUS	JUDGE HAIK
WILLIAMS, INC. and ATCHAFALAYA CRAWFISH CONSERVATION ASSOCIATION	MAGISTRATE JUDGE METHVIN

****

MEMORANDUM RULING

****

This matter is before the Court on Defendants', Williams, Inc. and Atchafalaya Crawfish Conservation Association, (hereinafter, "Williams, et al."), Motion for Summary Judgment. The Motion for Summary Judgment was opposed by Plaintiffs, Charles R. Blanchard, Sr. and West Louisiana Crawfish Producers Association, Inc., (hereinafter, "Blanchard, et al."). For the reasons stated herein, Williams' Motion for Summary Judgment is hereby GRANTED.

I. BACKGROUND

This controversy arises from a dispute between crawfishermen and the owners of approximately 95,000 acres of the Lower Atchafalaya Basin. In particular, the area involved consists of flooded swamplands lying between two navigable water bodies, the Atachafalaya and Mississippi Rivers. For up to six months of each year, this area is inundated by waters of the Atchafalaya River and its distributaries as water is diverted into this area for flood control purposes. It is uncontested that during certain periods of time the water depth in this area ranges from six inches to six feet.

Plaintiffs, Blanchard, et al., are private citizens who seek a declaratory judgment as to the nature and extent of their rights to "navigate" (in this specific instance they really mean to crawfish) in these submerged swamplands. Plaintiffs claim that the swamplands at issue are navigable waters and are subject to a public servitude under the Commerce Clause, the Act of Admission of the State of Louisiana and the Public Trust Doctrine. According to Plaintiffs, this servitude gives them an absolute right to crawfish the swamplands. Plaintiffs further contend that the owners of the swamplands have violated their civil rights by excluding the public from certain areas of the Basin and by the continued threat of arrest and prosecution for trespass.

It is undisputed that these plaintiffs are able to navigate, i.e. traverse, these swamplands in small motorized boats in extremely shallow waters. Thus, the true essence of this dispute is whether or not private

individuals, such as the plaintiffs, have a right to crawfish in this swamp area owned by the defendants, Williams, et al. and others. Crawfishermen have fished this area for decades and now the land owners, corporations that own the land under the swamp waters, want to exclude them from crawfishing on their properties without purchasing a permit from the defendants.

According to Defendants, the alleged public use rights claimed by the plaintiffs in these lands are in clear derogation of the defendants' private rights of use and enjoyment of these areas acquired by them and their ancestors-in-title from the federal and state sovereigns over a century ago. Based on this assertion, Defendants argue that by entering onto these areas of land, for purposes other than pure navigation, Plaintiffs are committing a criminal trespass.[2] Accordingly, Defendants have filed the instant Motion for Summary Judgment seeking to have those claims asserted by Plaintiffs in the Complaint for Declaratory Judgment dismissed.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Williams bases their Motion for Summary Judgment upon seven (7) independent legal grounds:

1. This Court lacks jurisdiction over the subject matter of this controversy as the

[2]This assertion has been upheld by the Louisiana Supreme Court in State v. Barras, 615 So.2d 285 (La. 1993).

claims asserted are solely matters of state property law and do not arise under the Constitution, laws, and treaties of the United States;

2. Admiralty jurisdiction does not exist over claims to fishing rights within territorial waters of the State of Louisiana which involve a purely local activity governed by state law;

3. Plaintiff Blanchard has no standing to raise the claims set forth in the Complaint because he has not alleged-and by his own testimony cannot demonstrate-an injury in fact resulting from a concrete and particularized legally-protected interest;

4. Plaintiff Producers has no standing to raise the claims set forth in the Complaint. Neither Producers nor any member thereof can demonstrate an injury in fact resulting from a concrete and particularized legally-protected interest, and because, even if the Association did have standing, the claims asserted herein, because of their nature, require the participation of the individual members and, therefore, should be brought directly by the individual members allegedly affected;

5. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. 1983 and 1988 because, among other things, it fails to allege with particularity conduct by Defendants under color of state law;

6. Plaintiffs fail to state a claim upon which relief can be granted under 42 U.S.C. 1985;

7. Plaintiffs, by their own admission, can demonstrate no evidence to substantiate their allegation that compensation was paid by the United States Army Corps of Engineers to private landowners for rights in areas now affected by artificially high water levels resulting from activities of the Corps of Engineers, much less that any such rights resulted in a general right of use in the public at large.

Under Federal Rule of Civil Procedure 56(c), a party bringing a Motion for Summary Judgment, in this case, Defendants Williams et al. bear the burden of showing that there is no genuine issue as to any material fact and that said party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Williams v. Shell Oil Co. 677 F.2d 506, 509 (5th Cir. 1982). In addition, any inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986);

citing United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed. 176 (1962).

The Court has reviewed the arguments and records submitted in support of and in opposition to Williams' Motion for Summary Judgment. In accordance with the above-cited principles of law, the Court developed the foregoing analysis of Defendants' Motion, viewing the contentions posed therein in a light most favorable to Plaintiffs.

A. JURISDICTION

As noted, in support of their Motion for Summary Judgment, Defendants challenge the jurisdiction of this Court over the plaintiffs' claims. One basis upon which the plaintiffs rely in attempting to invoke the jurisdiction of this Court is the existence of a federal navigational servitude. Such a servitude, according to the plaintiffs, allows public access to the contested areas of the Basin alleged by the defendants to be privately held.

A federal navigational servitude, such as that claimed by the plaintiffs in this case, exists by virtue of the Commerce Clause. Kaiser Aetna v. United States 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed. 2d 332 (1979). Specifically, Article I, Section 8, Clause 3 of the Constitution states that "...Congress shall have Power to ...regulate Commerce with foreign nations, and among the several States..." In addition, Title 33 U.S.C. Section 403 provides that "[t]he creation of any obstructions not affirmatively authorized by Congress, to the navigable

capacity of any of the waters of the United States is prohibited." Thus, a federal navigational servitude is created in navigable water bodies giving rise to an authority in the Government to assure that such waterbodies retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Id. at 178, 100 S.Ct. at 392.

For the purpose of determining whether a controversy "arises under" the laws of the United States, there must be a substantial claim founded directly upon federal law. Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed.2d 70 (1936) The requirement of substantiality of a federal question refers to whether there is legal substance to the position plaintiff is presenting, not to the value of the interests at stake. Shulthis v. McDougal, 225 U. S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912); Johnston v. Byrd, 354 F.2d 982 (5th Cir. 1965). For this reason, a dispute over whether there is a general right of use vested in the public arising from the authority over navigation conferred upon Congress by the Commerce Clause of Article I of the U. S. Constitution "arises under the laws and treaties of the United States." Thus, this dispute presents a federal question over which this court has jurisdiction.

The jurisdiction of this Court over the plaintiffs' claims to a federal navigational servitude arising under the Constitution of the United States is further affirmed by the United States Fifth Circuit Court of Appeals in Dardar v. Lafourche Realty, 985 F.2d 824 (5th Cir. 1993), [appealed after remand, 55 F.3d 1082 (5th Cir. 1995)] and

the United States Supreme Court in its landmark decision of Vaughn v. Vermilion, 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed. 2d 365 (1979).

In Dardar v. Lafourche Realty, Plaintiffs, commercial fishermen, sued LaFourche Realty Company, Inc., seeking the right to use a system of navigable waters owned and controlled by Lafourche Realty. Plaintiffs argued that the waterbodies in question were subject to a federal navigational servitude which gave the public unrestricted access. Similarly, in Vaughn v. Vermilion, the defendant, in response to plaintiff's request for an injunction prohibiting defendant from traversing its canal, insisted that despite plaintiff's property rights, defendant was entitled as a matter of federal law to enter the property without plaintiff's permission for the purpose of obtaining access to a highway of waterborne commerce, i.e. the Gulf Intercoastal Waterway.[3] The United States Supreme Court in Vaughn and the Fifth Circuit Court of Appeals in Dardar both assumed, without explicitly deciding, that federal question jurisdiction existed. If there was federal jurisdiction in Dardar and in Vaughn, there is federal jurisdiction here.

[3]Also at issue in Vaughn was the right to engage in commercial fishing and shrimping in the contested area. However, the Supreme Court, having ruled that no federal navigational servitude was applicable to the canal in dispute, did not reach the issue of whether said activities fall within the scope of such servitude.

Because the Court finds jurisdiction under 28 U.S.C. §1331, based on the plaintiffs' assertion of a federal navigational servitude arising out of the Commerce Clause of the United States Constitution, it is unnecessary to engage in an extensive analysis of plaintiffs' other bases for jurisdiction. Whether or not original jurisdiction exists independently over the plaintiffs remaining claims, it is clear that it is within the Court's discretion to exercise its supplemental jurisdiction over such claims under 28 U.S.C. § 1367.

B. PLAINTIFFS' FEDERAL CLAIMS

Although Plaintiffs have asserted claims which are founded directly upon federal law so as to properly invoke the jurisdiction of this court under 28 U.S.C. § 1331, it does not necessarily follow that such claims present any real basis for relief. Thus, the Court must examine each of the federal claims asserted in plaintiffs' complaint in an effort to determine whether there remains a genuine issue as to any material fact which would preclude summary judgment in favor of defendants as a matter of law.

1. FEDERAL NAVIGATIONAL SERVITUDE

As explained above, the navigational servitude, which exists in navigable waterbodies by virtue of the Commerce Clause, gives rise to an authority in the Government to assure that such waterbodies retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332

(1979); Vaughn v. Vermilion Corp., 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed.2d 365 (1979). The federal navigational servitude was discussed at length by the United States Supreme Court in the Seminal case of Kaiser Aetna v. United States.

In Kaiser Aetna, the Court was concerned with the public's right of access to Kuapa Pond, a large lagoon contiguous to a navigable bay but separated from that bay by a barrier beach. The pond was two feet deep and had been considered private property under Hawaiian law. Kaiser Aetna dredged the pond to a depth of six feet and, subsequent thereto, dredged a canal through the barrier beach leading into the nearby bay, thereby creating a marina. Kaiser Aetna then began to allow boats to pass from the newly built marina to the bay. However, Kaiser Aetna allowed access to the pond only to those who paid a fee for this privilege.

The Army Corps of Engineers, which had earlier consented to the improvement, declared the pond to be navigable water of the United States and demanded that Kaiser Aetna allow the public free access to the pond. The district court concluded that allowing free public access would result in a taking of private property without just compensation. United States v. Kaiser Aetna, 408 F.Supp. 42, 54 (D. Haw. 1976). The Court of Appeals reversed, United States v. Kaiser Aetna, 584 F.2d 378 (9th Cir. 1978), granting public access to what it held to be "navigable waters of the United States." The Supreme Court reversed, affirming the District Court's ruling. 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979).

In reversing the appellate court, the Kaiser Court provided some guidance for future cases by outlining several factors which may be considered in determining whether a navigational servitude exists.[4] These factors can be summarized by the Court as follows:

1. Could the waterbody in its natural state have been navigated?

2. Is this waterbody comparable to the major natural bodies of water to which the servitude has been previously applied?

3. Is the waterbody private property under the state law?

4. Has the waterbody been converted into navigable waters by the investment of private funds?

5. Did the entity consent to the changes which led to navigability?

In the case at bar, full application of the above-cited Kaiser factors would be impossible at this stage of litigation. Simply put, there are not enough undisputed facts before the Court at this time which would allow the Court to determine conclusively whether or not a federal

[4]The Supreme Court did not determine, however, whether in some circumstances one of these factors by itself may be dispositive.

navigational servitude exists over the contested swamplands.

Although the Court recognizes that there are material issues of fact with regard to the existence of a federal navigational servitude over the disputed swamplands, the Court finds that this case may, nevertheless, be ripe for summary judgment. Specifically, the Defendants, for the purposes of this Motion only, have conceded that the area in dispute is, indeed, "navigable-in-fact." Moreover, in both their brief and on hearing of this Motion, the plaintiffs have admitted, that their traversal of the Basin, and the disputed area in particular, has not, in any way, been obstructed or impeded by the actions of the defendants. Thus, it is clear to the Court that what is truly at issue in this case is not whether the servitude exists, but whether such servitude includes within its scope, rights to conduct commercial crawfishing activities on the waterbottoms of the disputed area.

Having narrowed and defined the issue to its true nature, that being the scope of a federal navigational servitude, the Court notes that such issue is one which has not previously been addressed by any Court. Kaiser, 444 U.S. at 170-171. Thus, without the guidance of judicial precedence, the Court shall focus on the nature of the federal navigational servitude, as well as its source, in order to the determine the extent to which the servitude should be applicable.

The Supreme Court has left no doubt that if and when a federal navigational servitude exists, it gives rise

to the right of the public to use those waterways as "continuous highways for the purpose of *navigation* in interstate commerce." Kaiser Aetna v. United States, (emphasis added) 444 U.S. at 178, 100 S.Ct. at 392; Dardar v. Lafourche Realty Co., Inc. 985 F.2d 824, 831 (5th Cir. 1993). "Navigation" is defined by Webster's Third New International Dictionary as the "act or practice of navigating; the science or art of conducting ships or aircraft from one place to another...". In addition, Black's Law Dictionary, Sixth Edition, citing The Silvia, 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed 241, defines "navigation" as "the act or the science or the business of traversing the sea or other navigable waters in ships or vessels."

A careful appraisal of the purposes for which the concept of "navigability" is being invoked in this particular case clearly indicates that such purposes do not fall within the activities that the servitude was intended to encompass. Specifically, as noted previously, the plaintiffs in this case do not seek access to the many thousands of areas of overflowed swamplands involved in this litigation merely for purposes of *navigation* as public highways in interstate commerce. Indeed, Plaintiffs admit that no obstruction of their *navigation*, as that term has previously been defined, or traversal of the bayous and streams which make up the Atchafalaya River System and its distributaries in this portion of the basin exists. Rather, the purpose for which the servitude is being invoked by plaintiffs in this matter is solely to conduct crawfishing

activities[5] only to advance the individual economic interests of these plaintiffs. Because activities such as crawfishing do not, in any way, constitute *navigation or traversal*, and, in fact, tend to create obstacles to pure *navigation* and *traversal*, they clearly fall outside of the scope of any navigational servitude which may (or may not) be imposed upon the area in question. Therefore, the Court finds that even in the event a federal navigational servitude is imposed on the swamplands at issue (which, as noted above cannot be determined at this time without additional facts) as a matter of law such servitude does not extend to public fishery rights, a matter governed solely by state law.

Further support for this position is offered in the case of Loving v. Alexander 745 F.2d 861 (4th Cir. 1984), wherein it was held that a federal navigable servitude allows the public access to the *surface* of the waterbody only. The Court in Loving noted that "the technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering such rivers. Whether in one or the other is a question of local law." Id. at 868 [citing United States v. Chandler-Dunbar W.P. Co., 229 U.S. 53 at p. 60, 33 S.Ct. 667 at p. 671, 57 L.Ed. 1063 (1913)].

[5]Plaintiffs, at the hearing on this Motion, stipulated that the act of crawfishing takes place on the bed or soil of the waterbottom and involves the anchoring of a rectangular wire trap to a tree, a marked buoy, or a stake embedded in the soil of the waterbottom.

Thus according to our decision, while the surface of the disputed area of the Atchafalaya Basin may or may not be subject to public use by virtue of the navigational servitude which arises under the Commerce Clause of the Constitution of the United States, the use of its bed and banks, and particularly public fishery rights therein, remain purely matters of state law.

2. THE ACT OF ADMISSION OF THE LOUISIANA INTO THE UNION

Apart from their claims arising from the alleged federal navigational servitude, the Plaintiffs contend that they have a federally conferred civil right to navigate and crawfish in the contested area of the Atchafalaya Basin based on public trust jurisprudence and the Act of Admission of the State of Louisiana in 1812.

Under the public trust doctrine, Louisiana, upon attaining statehood, received ownership of all navigable waters within its borders and all tide waters and lands under them from the United States in public trust. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479-81, 108 S.Ct. 791, 796-97, 98 L.Ed. 2d 877 (1988). However, in Phillips Petroleum Co., the United States Supreme Court reaffirmed its long-established rule that the individual states have the authority to define the limits of land held in public trust and to recognize private rights in such lands as they see fit. Specifically, the Court noted that its decision did nothing to change ownership rights in states which previously relinquished a public trust claim to tide lands and acknowledged that many coastal states, as

a matter of state law, have granted all or a portion of their tide lands to adjacent upland property owners long ago. Accordingly, this Court finds that as a matter of law there is no federal right under the public trust doctrine to fish and navigate in the areas in dispute. Rather, those rights are dictated solely by state law and policy.

The Court likewise finds that the Act for the Admission of Louisiana into the Union has no bearing on any federally protected rights asserted by the plaintiffs. The Act of Admission, upon which the plaintiffs rely, included the provision "that the Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states in the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state." Act of February 20, 1811; see 2 Stat. 642; see also 33 U.S.C. 10. This particular compact between Louisiana and the United States has never been the subject of judicial scrutiny. However, in Pollard v. Hagen, 44 U.S. 212, 11 L.Ed. 565 (1845), the United States Supreme Court, interpreted a similar provision contained in a compact entered into between the United States and Alabama as creating no federal power or right, but as merely evidencing the regulatory authority over commerce given to the United States under the Constitution. Specifically, the Court held that the state maintain the exclusive right to dispose of or otherwise regulate the use and enjoyment of the shores and soils under navigable waters within their respective jurisdictions. The Court further noted that this right is

subject only to the power conferred upon Congress under the Commerce Clause of the United States Constitution.

Thus as a matter of law neither the Act of Admission of the State of Louisiana to the Union in 1812 nor the Public Trust Doctrine create any greater right to navigate or to fish in navigable waters within the State of Louisiana, than exists under the Commerce Clause authority. As previously discussed, the Commerce Clause does not create individual federal rights in these plaintiffs to crawfish in the contested areas. Accordingly, any and all claims asserted by Plaintiffs under said Acts are also dismissed.

3. CIVIL RIGHTS

The only remaining federal claim asserted by the Plaintiffs which must be addressed by this Court is asserted under 42 U.S.C. §§ 1983 and 1988. The plaintiffs contend that Defendants, acting in concert with unspecified third parties, have excluded them from certain waters of the Atchafalaya Basin, thereby depriving them of a claimed federal right to fish and navigate in such waters. Specifically, Plaintiffs claim that Defendants illegally posted "no-trespass" signs on allegedly public areas, patrolled those areas for trespassers and through threats of prosecution for trespass pursuant to applicable Louisiana law, and in one instance, an alleged actual prosecution for trespass of unnamed parties, excluded plaintiffs from fishing and navigating in such waters.

The two essential elements of a § 1983 cause of action are: (a) that the plaintiff suffer a deprivation of a right secured by the Constitution or Federal law and (b) that the deprivation occurred under color of state law. Parratt v. Taylor, 45 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420 (1981). It is well settled that allegations of concerted action between private parties and state officials sufficiently conveys "state action" for purposes of such a civil rights action. Fulton v. Emerson Electric, 420 F.2d 527 (5th Cir. 1969) cert. den. 398 U.S. 903, 90 S.Ct. 1689, 26 L.Ed.2d 61 (1970). However, the Fifth Circuit requires specificity in § 1983 claims. Particularly, in order to survive a motion to dismiss, "...the plaintiff must allege with particularity that a state official, acting in his official capacity, conspired with the private defendant to violate the plaintiff's constitutional rights." A bare allegation that the private defendant and state officials acted in concert is no evidence of conspiracy. The plaintiff must make a factual disclosure tending to show that the private defendant and public official directed themselves toward unconstitutional actions in accordance with a mutual understanding.

Nowhere in the pleadings, depositions, affidavits or otherwise have plaintiffs alleged any specific facts from which the Court can glean any evidence of a pre-conceived concerted action between the defendants and some state agent. Having failed to allege proper facts to establish a "state action," Plaintiffs have failed to state a claim under 42 U.S.C. § 1983. Therefore, like Plaintiffs' claims under the federal navigational servitude, the Act of Admission of the State of Louisiana and the Public Trust

Doctrine, Plaintiff's assertions under the Civil Rights Act are also insufficient to withstand Summary Judgment and are hereby dismissed.

C. SUPPLEMENTAL STATE LAW CLAIMS

Having effectively disposed of all federal claims in this matter, the Court must now determine whether to retain jurisdiction over the plaintiffs' claims which have been asserted under the laws of Louisiana. The applicable standard for such a determination is contained in 28 U.S.C. § 1367 which provides in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties...
>
> (c) The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

> ...(3) the district court has dismissed all claims over which it has original jurisdiction...

As noted above, the decision of this Court effectively dismisses any and all of Plaintiffs' federal claims against defendants. Thus, under the above-cited statute, a determination as to whether to retain jurisdiction over the plaintiffs' supplemental state law claims is within the discretion of the Court. Because these remaining claims involve issues which concern well-established policy consideration militating against federal court involvement in state property disputes, the Court shall decline to exercise its supplemental jurisdiction over the plaintiffs' state law claims.

III. CONCLUSION

The Court recognizes that this decision may have profound and wide ranging effects on the lives of many commercial fishermen who have, for generations, depended upon the area of the Atchafalaya Basin now in dispute for their livelihood in crawfishing. However, the Court must look beyond emotion and sentiment, as well as the tide of public opinion, that this case necessarily invokes, and focus only on the law. In this case the law clearly dictates that this Court is not the proper venue or forum for the determination and resolution of such inherently state based issues. The state legislature and state courts are better equipped to resolve pure state law issues such as those presented in this case. Thus, based

upon the foregoing analysis, the Court finds that Williams' Motion for Summary Judgment is hereby GRANTED.

THUS DONE AND SIGNED this _____ day of September, 1995 at Lafayette, Louisiana.

_____
RICHARD T. HAIK
UNITED STATES DISTRICT COURT

33 USCS § 403

§403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the Untied States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuse, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same. (Mar. 3, 1899, ch 425, § 10, 30 Stat. 1151.)

ACT OF ADMISSION

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north, to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning: including all islands within three leagues of the coast, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper, under the provisions and upon the conditions herein after mentioned.

Sec. 2. *And be it further enacted*, That all free white male citizens of the United States, who shall have arrived at the age of twenty-one years, and resided within the said territory, at least one year previous to the day of election, and shall have paid a territorial, county, district or parish tax: and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the said territory, be, and they are

hereby authorized to choose representatives to form a convention, who shall be apportioned amongst the several counties, districts and parishes, within the said territory of Orleans, in such manner as the legislature of the said territory shall by law direct. The number of representatives shall not exceed sixty; and the elections for the representatives aforesaid shall take place on the third Monday in September next, and shall be conducted in the same manner as is now provided by the laws of the said territory for electing members for the House of Representatives.

Sec. 3 *And be it further enacted*, That the members of the convention, when duly elected, be, and they are hereby authorized to meet at the city of New Orleans, on the first Monday of November next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be expedient or not, at that time, to form a constitution and state government, for the people within the said territory, and if it be determined to be expedient, then the convention shall in like manner declare, in behalf of the people of the said territory, that it adopts the constitution of the United States; whereupon the said convention shall be, and hereby is authorized to form a constitution and state government, for the people of the said territory: *Provided*, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure to the citizen the trial by jury in all criminal cases, and the privilege of writ of *habeas corpus*, conformably to the provisions of the constitution of the United States; and

that after the admission of the said territory of Orleans as a state into the Union, the laws which such state may pass shall be promulgated, and its records of every description shall be preserved, and its judicial and legislative written proceedings conducted, in the language in which the laws and the judicial and legislative written proceedings of the United States are now published and conducted: *And provided also*, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting the said territory do agree and declare, that they for ever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States; and, moreover, that each and every tract of land, sold by Congress, shall be and remain exempt from any tax, laid by the order or under the authority of the state, whether for state, county, township, parish or any other purpose whatever, for the term of five years from and after the respective days of the sales thereof; and that the lands, belonging to the citizens of the United States, residing without the said state, shall never be taxed higher than the lands belonging to persons residing therein; and that no taxes shall be imposed on lands the property of the United States; and that the river Mississippi and the navigable rivers and waters leading into the same or into the gulf of Mexico, shall be common highways and for ever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state.

Sec. 4. *And be it further enacted*, That in case the convention shall declare its assent, in behalf of the people

of the said territory, to the adoption of the constitution of the Untied States, and shall form a constitution and state government for the people of the said territory of Orleans, the said convention, as soon thereafter as may be, is hereby required to cause to be transmitted to Congress the instrument, by which its assent to the constitution of the United States is thus given and declared, and also a true and attested copy of such constitution or frame of state government, as shall be formed and provided by said convention, and if the same shall not be disapproved by Congress, at their next session after the receipt thereof, the said state shall be admitted into the Union, upon the same footing with the original states.

Sec. 5 *And be it further enacted*, That five per centum of the net proceeds of the sales of the lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said state, as the legislature thereof amy direct.

APPROVED, February 20, 1811.

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December 9, 1996 3:22pm

Supreme Court, U.S.
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No. 96-948

In The

Supreme Court of the United States

October Term, 1996

CHARLES R. BLANCHARD, SR. and
WEST LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION, INC.,

Petitioners,

v.

WILLIAMS, INC. and ATCHAFALAYA
CRAWFISH CONSERVATION ASSOCIATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

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LIST OF PARTIES

Atchafalaya Crawfish Conservation Association

Williams, Inc.

CORPORATE DISCLOSURE STATEMENT

Williams Land Company, L.L.C. and 44 Production Company, L.L.C are affiliates of Williams, Inc.

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STATEMENT OF THE CASE

Introduction

Respondents Williams, Inc. ("Williams") and Atchafalaya Crawfish Conservation Association ("ACCA"), sometimes hereinafter referred to collectively as the "Landowners," jointly file this brief in opposition to the petition for review filed by Charles R. Blanchard, Sr. ("Blanchard") and West Louisiana Crawfish Producers Association, Inc. ("Producers"), sometimes hereinafter collectively referred to as the "Crawfishermen."

The Crawfishermen instituted this proceeding seeking a declaratory judgment fixing the extent and nature of their rights to commercially crawfish on privately-owned swamplands comprising in excess of 95,000 acres situated within the Atchafalaya Basin of Louisiana. The Crawfishermen also claimed that the Landowners' acts of posting, patrolling and threatening trespass actions in these contested areas were illegal and sought to enjoin the Landowners from interfering with the alleged public rights to crawfish in these areas.

Asserting federal question jurisdiction of the matter, the Crawfishermen claim that there are federally protected fishery rights in these areas and that they are protected under the Civil Rights Act from posting and threatening enforcement of state criminal trespass laws which may operate to preclude them from their alleged public right to use and enjoy these lands for their crawfishing activities. The Crawfishermen further alleged pendent jurisdiction of state property law claims to crawfish in the contested areas.

Williams is an owner of lands within the Atchafalaya Basin, some of which are leased to others for commercial crawfishing. ACCA is a corporation which has as its principal business the conduct of commercial crawfishing operations on lands leased from others, including Williams. The Landowners deny that lands they own or lease

are subject to any public right of access or use for commercial crawfishing purposes. The Landowners filed a motion for summary judgment. Finding no basis in federal law for the rights claimed by the Crawfishermen, the United States District Court for the Western District of Louisiana issued a memorandum ruling and final judgment in favor of the positions asserted by the Landowners, granting the motion for summary judgment and dismissing the Crawfishermen's claims, without prejudice to their right to pursue their state law claims in the state courts of Louisiana.

On appeal by the Crawfishermen asserting the same federal rights claimed on this petition for review, the United States Court of Appeals for the Fifth Circuit affirmed the District Court judgment, finding no reversible error. The Fifth Circuit did not designate its opinion for publication, implicitly recognizing that the case was decided on the basis of well-settled principles of law and concerned no legal issues of significant public interest. See 5th Cir. R. 47.5.

Statement of Facts

Contrary to the suggestions contained in the Crawfishermen's petition to this Court, the area in controversy is not a large navigable waterway fished by these Crawfishermen or their ancestors since time immemorial. The area in controversy is swampland situated entirely within the Atchafalaya Basin Floodway (the "Floodway"). The Floodway is a vast area more than 130 miles long which contains a network of channels, lakes and forested swamps. There are interstate highways which cross the Floodway and state roads which exit the interstate and provide access to trailer parks and campsite developments which exist throughout the Floodway. Guide levees now artificially define the area directly affected by the Floodway's major water course, the Atchafalaya River.

The area in controversy consists of about 95,000 acres of privately owned land located in the lower regions of

the Floodway. The Crawfishermen claim no ownership interest in these lands. The majority of these lands were originally acquired by the State of Louisiana from the United States as swamp and overflowed lands pursuant to the Swamp Land Grants of 1849 and 1850, prior to transfer by the State into private ownership.

Moreover, the area claimed by the Landowners and over which dominion is being exercised does not extend below the level of ordinary low water.[1] Not only are the activities of the Crawfishermen occurring within the forested privately owned portions of the Floodway, those activities require the actual use of the privately owned bottom and/or privately owned timber resources. The activities for which the Crawfishermen seek federal protection are neither traditional fishing activities nor acts of navigation. Rather, those activities, which require the placement of traps on the bottom of the swamp for weeks at a time and further require the anchoring of the trap to a tree or stake embedded in the soil, constitute impediments to navigation.

Throughout this proceeding, the Crawfishermen have attempted to mask their claims as an effort to recognize a public right to navigate on and use waterways. Their claims, however, have nothing to do with rights of

---

[1] The area between ordinary low water and ordinary high water on rivers and streams is defined in Louisiana law as the "bank." La. C.C. art. 456. The bank along the riparian swampland, pursuant to Louisiana law, is privately owned. Ibid.; see also *State v. Richardson*, 140 La. 329, 72 So. 984 at 990-991 (1916). The pleadings in this litigation and the Statement of Material Undisputed Facts filed in connection with the motion for summary judgment confirm that the activities of the Crawfishermen occur above ordinary low water.

navigation on waterways; rather, they seek a public right to access and use private swampland, to tie boats and nets to trees growing on those lands and to otherwise conduct commercial crawfishing operations thereon.[2]

In 1990, ACCA embarked on a legitimate business venture of leasing private property for the purpose of engaging in commercial crawfishing activities. Many crawfishermen participated in its leasing/permit program. In order to protect its property rights and those of its permittees, ACCA, through its representatives, brought trespass complaints under Louisiana state law against crawfishermen placing traps on these private lands without permission who refused after several requests to obtain permits or cease crawfishing on the private swamplands. In both lower courts, these petitioners advanced a groundless civil rights complaint founded on a naked claim that the District Attorney of Iberia Parish "presumptively" agreed to prosecute individuals pursuant to ACCA's enforcement of its leasing program and carried out that concerted plan to their detriment.[3] That claim was properly dismissed by the courts below and has been abandoned by the Crawfishermen in this petition for review.

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[2] Thus, contrary to the question for review posed by the Crawfishermen in their petition to this Court, the real issue in this case, as recognized by the District Court, is whether federal law permits the public at large to conduct commercial crawfishing activities on privately-owned waterbottoms accessible from navigable waters.

[3] In fact, only one prosecution has been pursued by the District Attorney's office on complaint of a Williams, Inc. lessee on lands in controversy in this proceeding outside the ACCA area, *which prosecution was affirmed as legally proper in the state courts of Louisiana*. See *State v. Barras*, 615 So. 2d 285 (La. 1993). Five arrests made on complaint of ACCA in the area in controversy have not been prosecuted beyond bill of information to date.

Finally, it should be noted that behind this effort to convert private property rights of the Landowners into free public domain are the Crawfishermen's objections to permit fees, seasonal limitations on crawfishing use and the imposition of *statutorily-required* mesh size restrictions on the crawfishing activities allowed on these private swamplands by the Landowners in order to conserve and manage the crawfish resource. Since the inception of this litigation, the State of Louisiana through its Department of Wildlife and Fisheries has imposed similar limitations upon publicly owned swamplands within the Sherbourne Wildlife Management Area of the Floodway in Iberville Parish north of the acreage in dispute in this proceeding. Emergency regulations adopted May 4, 1995 include provisions which close certain tracts of recently forested land to crawfishing, set a crawfish season on the remainder of the property, require a crawfish permit and set a fee therefor and restrict use of motor boats on some of the property (which often occasion damage to the levees and small trees requiring expensive repair). See La. Admin. Code 76: VII.177, reprinted at Volume 21 Louisiana Register No. 5. These regulations were deemed necessary due to the negative impact on wildlife and timber resources from unregulated commercial and recreational crawfishing on the public property. These regulations further demonstrate that, as properly recognized by the courts below, crawfishing is an inherently land-based activity which not only requires use of waterbottoms but often occasions damage to private land resources.

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit in this matter affirms a United States District Court finding that no federal law confers a public right to crawfish on privately-owned swampland accessible from navigable water, a property law question dictated by state law and properly resolved in the state courts of Louisiana. That decision creates no conflict with

any other United States Circuit Court of Appeals' decision or with any relevant decision of this Court. It involves no conflicting principles of federal law, the settlement of which is of importance to the public.

In their effort to create a federal right where none exists, the Crawfishermen invoke ancient principles of English law and the Magna Charta, attempt to impress property law principles of other states upon Louisiana under the guise of federal common law and to transform statehood acts intended to assure that navigable waterways remain free *highways* of transportation among the citizens of the states into a federal right in the public to create commerce from the private property of others. At the same time, they ignore modern pronouncements of the United States Supreme Court and of the Congress of the United States, of the Louisiana Supreme Court and of the Legislature of the State of Louisiana which recognize that crawfishing rights on privately owned swamplands are matters of state property law.

As indicated by the argument which follows and by the disposition of this case by the Fifth Circuit below, there is no compelling reason for this Honorable Court to review this case on writ of certiorari inasmuch as the decision of the lower courts comports with settled federal law, specific Congressional legislation and over a century of Supreme Court pronouncements.

ARGUMENT AND AUTHORITIES

1. THERE IS NO RIGHT UNDER FEDERAL LAW TO CRAWFISH ON PRIVATELY OWNED SWAMPLAND ACCESSIBLE BY BOAT FROM NAVIGABLE WATERS. THE FIFTH CIRCUIT DECISION IN THIS REGARD IS CONSISTENT WITH A LONG HISTORY OF JURISPRUDENCE FROM THIS COURT.

The Crawfishermen argue that questionable principles of English common law[4] have become federal common law impressing upon Louisiana's civil law of property a federal right to crawfish on privately owned lands beneath navigable waters. A long line of jurisprudence from this Court and specific Congressional legislation clearly reject such a notion.

In *Martin v. Waddel*, 41 U.S. 367, 10 L.Ed. 97 (1842), cited by the Crawfishermen, the Court had this to say:

> We do not propose to meddle with the point which was very much discussed at bar, as to the power of the King, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. . . . And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. *For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject*

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[4] Note Justice Thompson's dissent in *Martin v. Waddel*, 41 U.S. 367 at 418-434.

> *only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to the grants of the British Crown, when the title is held by a single individual, in trust for the whole nation.* See 41 U.S. 367 at 410-411 (emphasis added).

In *Hardin v. Jordan*, 140 U.S. 371, 11 S. Ct. 808, 35 L.Ed. 428 (1891), the Court observed, with respect to title to and use of state sovereignty lands:

> Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. *The state may even dispose of the usufruct of such lands, as is frequently done by leasing the oyster beds in them, and granting fisheries in particular localities;*. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, *state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce* and in subjecting the lands to the necessities and uses of commerce. . . . *but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.* See 140 U.S. 381, 382 (emphasis added).

In *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331 (1894), the Court clarified the nature of the so-called "public trust" or "equal footing" title by which the federal government held territory like that of Louisiana prior to its admission to statehood, observing that:

> The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters,

> and in the lands under them, within their respective jurisdictions. *The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.*
>
> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tidewaters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of *leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states,* respectively, *when organized and admitted into the Union.* See 152 U.S. 1, 57-59 (emphasis added).

In *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 41 S. Ct. 237 (1921), Justice Brandeis, speaking for a unanimous Court, stated:

> The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. . . . The character of the state's ownership in the land and in the waters is the full proprietary right. *The state, being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the state of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same is a matter*

> *wholly of local law. Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331. *Upon such questions the provisions of the Constitution and statutes of the state and the decisions of its highest court are accepted by us as conclusive.* 255 U.S. 56 at 63 (emphasis added).

Finally, in its most recent pronouncement on the subject, this Court, after a lengthy review of the history of law in this area, stated in *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L.Ed.2d 877 (1988), that:

> . . . But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit. [citing *Shively v. Bowlby*]. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13 – more private interests than were recognized at common law, or in the dictates of our public trust cases.
>
> . . . many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here. See 484 U.S. 475-476, 483.

Consistent with this long history of Supreme Court pronouncements, the Congress of the United States in 1953 confirmed the ownership and dominion of the States to the lands beneath navigable waters within their respective boundaries and of the fisheries resources therein, declaring in the Submerged Lands Act that:

> "Title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and *the right and power to manage*, administer, *lease*, develop, *and use the said lands and*

> *natural resources all in accordance with applicable State law* be, and they are hereby, subject to the provisions hereof, recognized, *confirmed*, established, invested in and assigned *to the respective States or the persons* who were on June 5, 1950 *entitled thereto under the law of the respective States in which the land is located*, and the respective grantees, lessees or successors in interest thereof;" See 43 U.S.C. §1311(a).

"Natural resources" is defined at Section 1301(e) to include fish, shrimp, oysters, crabs, lobsters and other marine animal life. The legislative history of the Submerged Lands Act contains the following observations with respect to the Congressional intent:

> The earliest assertions by the States of proprietary rights in their submerged lands arose in connection with the regulation of fishing. Except in a few instances, where international treaties were involved, State control of fishing in navigable waters, within the State's boundaries, has been exclusive. The principal basis for this right to control fishing rests upon the proprietary rights of the State to the waters and the soil thereunder.
>
> * * *
>
> The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.
>
> * * *
>
> *State control of fishing, especially for sedentary fish, such as shrimp, oysters, clams, crabs, lobsters, etc., has been based upon the State's ownership of the*

> *soil.*[5] Regulations by many States are based upon the statutory declaration of the state's ownership of the waters and the fish in them. (emphasis added)
>
> * * *
>
> The uses to which these lands are put are essentially local in character, and are of primary concern to the people of the particular locality. Any conflict of interests arising from the use of the submerged lands should be and can best be solved by local authorities. See *Submerged Lands Act*, House Report No. 215 to accompany H.R. 4198, Appendix I, 83d Cong., 1st Sess. (1953), reprinted in 1953 United States Code Congressional and Administrative News 1385 at 1426-1437.

The suggestion by the Crawfishermen of a conflict with the decision of this Court in *Vaughn v. Vermilion Corp.*, 100 S. Ct. 399 (1979), is wholly without merit. The *Vaughn* decision is inapposite as a matter of fact and law. It involved an alleged right of public access to private navigable canals for travel and fishing. On the questions certified for review, this Court held that (1) although channels built on private property with private funds ultimatly join with other navigable waterways, *no general right of use in the public arises by reason of the authority over navigation conferred upon Congress by the Commerce Clause* of the Constitution and (2) if, however, the construction

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[5] La. R.S. 9:1101 declares Louisiana's ownership of navigable waters and the beds thereof not under the direct ownership of any person on August 12, 1910, and its right to the possession of same, subject only to the paramount right of the United States to control *navigation* on such waters. See, generally, 53 Louisiana Law Review 35 at 43-77. Note also that La. R.S. 41:1701 recognizes the public fishery interests of the State in, and its management authority over, *state-owned* navigable *waterbottoms*.

of the artificial waterways destroyed the navigability of the surrounding natural waterways, they could become substituted therefor and subject to public use under the limitations and guidelines established by the Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332.

In this litigation, the Crawfishermen admit in their complaint that none of the waterbottoms at issue are private canals which destroyed former navigable waterways and that crawfishing and other commercial fishing is not done to any significant extent in canals. Moreover, the use of the private waterbottoms was not at issue in *Vaughn*.

There is no federal statutory or common law right to crawfish on private property beneath navigable waters within the State of Louisiana. On the contrary, the jurisprudence of this Court and federal statutes confirm that these are matters of individual state law and policy.

2. NO INDIVIDUAL FEDERAL RIGHTS ARISE UNDER THE "PUBLIC TRUST" OR "EQUAL FOOTING" DOCTRINE. MOREOVER, THAT DOCTRINE HAS NO APPLICATION TO VIRTUALLY ALL OF THE PROPERTY IN DISPUTE IN THIS LITIGATION WHICH WAS ACQUIRED BY THE STATE OF LOUISIANA, NOT BY RIGHT OF INHERENT SOVEREIGNTY UPON ADMISSION TO STATEHOOD, BUT BY GRANTS FROM THE UNITED STATES GOVERNMENT AS SWAMP AND OVERFLOWED LANDS OR LANDS OTHERWISE ABOVE THE LIMITS OF HIGH WATER, AND LATER CONVEYED BY LOUISIANA INTO PRIVATE OWNERSHIP.

A. No Individual Federal Rights Arise Under the Public Trust or Equal Footing Doctrine

As previously noted, each state obtained ownership of and dominion over lands covered by tide waters and navigable waterbottoms within its limits at the time of

sovereignty, with the consequent right to use or dispose of any portion thereof subject to the right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. Upon statehood, the federal trust title was relinquished. See also *Pollard's Lessee v. Hagen*, 44 U.S. 212, 11 L.Ed. 565 (1845); *Weber v. Commissioners*, 18 Wall. 57 (1873); *McGilvra v. Ross*, 215 U.S. 70, 30 S. Ct. 27, 54 L.Ed. 95 (1909); *United States v. Cress*, 243 U.S. 316, 37 S. Ct. 380 (1917). A century ago, this Court, in examining the disposition of public use and ownership rights made by the respective States in waterbottoms acquired by right of inherent sovereignty, observed "that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interest of the public." See *Shively*, supra, 157 U.S. 1, at 26, 14 S. Ct. 548 at 557.

In *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S. Ct. 582, 50 L.Ed.2d 550 (1977), this Court rejected the application of federal common law to determine ownership rights in waterbottoms acquired by the State of Arizona upon its admission to the Union, observing that once the equal footing doctrine vested title in the States, upon their admission to the Union, in the lands underlying navigable waters within their boundaries, the force of the doctrine was spent. Citing *Pollard's Lessee v. Hagen*, the Court affirmed the absolute title of the states to the beds of navigable waters, "which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating." Citing *Shively v. Bowlby*, the Court affirmed that the title and rights of riparian proprietors in the soil below the high water mark is governed by the laws of the several states, subject only to the rights

granted to the United States by the Constitution, under which Congress by virtue of its commerce power possesses a navigational servitude with respect to navigable waters for the purpose of regulating and improving navigation. The Court also affirmed that riparian rights in the banks and shores of waterways are governed not by federal law but rather by the laws of the several States, citing with approval its observation in *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1877), that if the States choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

In *Appleby v. City of New York*, 271 U.S. 364, 46 S. Ct. 569 (1926), the Court expressly recognized that the power of a state to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself, is a state question to be determined from the law of the state at the time the deeds to the property were executed. Commenting specifically with regard to the Court's earlier decision in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892), the Court affirmed that the public trust doctrine does not impose any limitation upon the power of a state to dispose of public trust property as an incident and part of its sovereignty, whether the disposition be in full ownership or subject to public easement, provided the disposition is reasonable and can fairly be said to be for the public benefit or without substantial impairment of the public interest in the lands and the waters remaining. See 271 U.S. 364 at 393-395, 46 S. Ct. 569 at 578.

In its recent re-examination of the public trust doctrine in *Phillips Petroleum v. Mississippi*, supra, the Court reaffirmed its long-established rule that the individual States have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit. There is accordingly no federal right which may be claimed by these Crawfishermen under a

federal public trust doctrine to fish in the areas in dispute, those rights being dictated by state law and policy.

B. The Vast Areas of Swamp and Overflowed Lands In Which the Crawfishermen Claim Public Use Rights in This Proceeding Are Unaffected by the Public Trust Doctrine

Moreover, the vast areas of swamp and overflowed lands within the high water areas claimed by these plaintiffs were not acquired by the State of Louisiana by right of inherent sovereignty under the equal footing or public trust doctrine. Many of these lands passed directly into private ownership *after Louisiana statehood by grant from the United States* as public lands above the limits of high water. Most were transferred by the United States to the State of Louisiana after its admission to the ends of private reclamation and development under the federal swamp land grants of 1849 and 1850.[6] The very purpose of these grants was to aid the State of Louisiana, *through the revenues to be generated by the sale and subsequent taxation of such lands,* in constructing the necessary levees and drains to protect the valuable agricultural lands, plantations and settlements along the Mississippi River and its major distributaries from annual floods and to reclaim the swamp and overflowed lands within the State. See Act of March 2, 1849, C. 87, 9 Stat. 352 and Act of September 28, 1850, C. 84, 9 Stat. 519; see 43 U.S.C. §981 et seq.; see also La. Acts 74 of 1892, 18 of 1894, 160 of 1900 and 205 of 1910; and Madden, Federal and State Lands in Louisiana (1973) at pages 291-296. The Crawfishermen do not and cannot challenge the disposition of these lands by the State of Louisiana as public lands above the limits of

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[6] In *McDade v. Bossier Levee Board,* 109 La. 625, 33 So. 628 (La. 1902), the Louisiana Supreme Court affirmed that even permanently overflowed swamps, or so-called shallow lakes, were included within the federal swamp land grants.

high water which were susceptible to private ownership. See *Chauvin v. Louisiana Oyster Commission*, 121 La. 10, 46 So. 38 (La. 1908); *State v. Sweet Lake Land and Oil Co.*, 164 La. 240, 113 So. 833 (La. 1927) and *State v. Danzy*, 527 So.2d 68 (La. App. 3rd Cir. 1988), writ denied.

3. THE ACT OF ADMISSION OF LOUISIANA INTO THE UNION RECOGNIZED MERELY THE RIGHT OF FREE PASSAGE UPON THE MISSISSIPPI RIVER AND OTHER IMPORTANT NAVIGABLE STREAMS AND WATERWAYS WHICH BECAME STATE-OWNED BY RIGHT OF SOVEREIGNTY IN 1812 AND ESTABLISHED NO FEDERAL RIGHT OR INTEREST IN SUCH WATERWAYS SAVE THAT SURRENDERED TO THE UNITED STATES GOVERNMENT UNDER THE CONSTITUTION.

The Crawfishermen argue that under the Act of Admission of 1812, they have a federally conferred civil right to crawfish on the Landowners' property.[7] The Act for the admission of Louisiana into the Union included the provision "that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states in the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state." Act of February 20, 1811; see 2 Stat. 642; see also 33 U.S.C. §10.

From the simple, unambiguous language of the Act, it is clear that the enjoyment of navigable waters leading

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[7] Faced with the absence of any express or otherwise reasonable suggestion of fishing rights within the language of this statute, the Complaint by these Crawfishermen inferred that this Act created a *federal navigational servitude which protects public fishery rights*, although they later disclaimed any dependency of fishing rights on navigational uses.

to the Mississippi River and the Gulf of Mexico as "common highways" contemplates nothing more than the enjoyment of the water for purposes of navigation – of passing and repassing, as a public highway, like a public highway on land. It is *not* the use of the waterbodies *for any public purpose* but for purposes of navigation and such other uses as are incident to the enjoyment of the water body as a public highway. That enjoyment creates no rights or benefit in the public to the soil of the navigable stream, which remains subject to any lawful private or public control or use as does not impede or interfere with the use of the water body as a public highway. Crawfishing, as manifested in the deposition testimony of petitioner Blanchard and acknowledgments of his counsel,[8] is an activity which peculiarly takes place on the bed or soil of the waterbottom and requires the anchoring of a trap to a tree, stake or other potential obstruction to the use of the waters as a public highway in navigation. Thus, waterbottom areas susceptible to crawfishing are inherently insusceptible to use as public highways within the intent of the Act of Admission.

A similar provision to Louisiana's Act is found in the compact entered into between the United States and Alabama as a condition of its admission into the Union. That compact was interpreted by this Court in *Pollard's Lessee v. Hagen*, supra, as creating no federal power or right, but as merely evidencing the regulatory authority over commerce given to the United States under the Constitution. The Court affirmed the exclusive right of sovereignty in the States to dispose of or otherwise regulate use and enjoyment of the shores and soils under navigable waters within their respective jurisdictions, subject only to the power conferred upon Congress under the Commerce

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[8] See the stipulation by the Crawfishermen noted at page 16 of the Memorandum Ruling of the District Court in this proceeding, appended to the writ petition herein. Note also *State v. Barras*, 615 So.2d 285 at 287.

Clause of the United States Constitution. Thus, as a matter of federal law, the Act of Admission confers no greater right in those navigable waters within the State of Louisiana to which it applies, than exists under the Commerce Clause authority which, as addressed below, creates no individual federal rights in the Crawfishermen to fish in the contested areas.

Shively, supra, and *Burns v. Crescent City Rod & Gun Club*, 41 So. 249 (La. 1906), cited by the Crawfishermen as recognizing a public trust fishery right implemented under authority of the Act of Admission, are inapposite. *Shively*'s references to the various acts establishing territorial government or admitting states into the Union reflect merely the design to preserve navigable waterways as public or common highways. *Burns* makes no mention of public trust fishing rights (since none exist) and cites the Act of Admission only in passing without any holding thereon. More importantly, *Burns* ties the right to fish upon a determination of whether the waterbodies were navigable *and* state-owned (i.e., "it is because navigable rivers afford a way of communicating that the legislature has placed them in the public domain"), as to which only one of the waterbodies at issue in that case qualified.

New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District, 874 F.2d 1019 (5th Cir. 1989) is similarly inapposite, the authorities relied upon in that decision clearly indicating that the Act's proscription of duties, imposts or tolls relates solely to the privilege of *navigating* through the waters to insure a highway equally open to all. See *Hampton v. Vicksburg, S & P.R., Co.*, 119 U.S. 280, 285, 7 S. Ct. 206, 208 (1885); *Cardwell v. American Bridge Company*, 113 U.S. 205, 5 S. Ct. 423 (1885); *Escanaba Company v. Chicago*, 107 U.S. 678, 2 S. Ct. 185 (1883).[9]

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[9] Furthermore, *Dardar v. Lafourche Realty*, supra, determined that the Act of Admission does not apply to all

4. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO FISH ON PRIVATELY OWNED SUB-AQUEOUS LAND, EVEN IF NAVIGABLE-IN-FACT TO COMMERCIAL CRAWFISHERMEN.

It is settled law that the ownership of, and dominion and sovereignty over, navigable waterbottoms within the limits of the states belong exclusively to the respective States in which they are found, including the right to recognize private rights in such lands as each state sees fit, subject only to the paramount right of Congress to control their *navigation* so far as may be necessary for the regulation of commerce among the states and with foreign nations. See authorities previously cited herein. Clause 3 of Section 8 of Article 1 of the Constitution recognizes that Congress shall have the power to regulate commerce with foreign nations and among the several states. Congress possesses by virtue of its commerce power a navigational servitude with respect to navigable waters for the purpose of regulating and improving navigation.[10] See *Gibson v. United States*, 166 U.S. 269, 17 S. Ct. 578, 41 L.Ed. 996 (1897). The exercise of the Commerce Clause authority of Congress is, in turn, subject to the prohibition of the Fifth Amendment of the United States

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waterways leading to the Gulf of Mexico, but only to waterways which were navigable in fact at the time of its enactment in 1812. The statute was also never intended to apply to waterways only capable of an imperfect navigation in times of floods and very high water. See *Boykin & Lang v. Shaffer*, 13 La. Ann. 129, 130-131 (1858).

[10] The removal of any obstruction to navigable waters of the United States lies within the authority delegated by Congress to the United States Army Corps of Engineers. *California v. Sierra Club*, 101 S. Ct. 1775 (1981), affirmed that the Congressional prohibition against obstruction of navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899 does not confer a private right of action to contest such obstructions.

Constitution against the taking of private property for public use without compensation. See *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979).

Precedents of the United States Supreme Court also recognize that while the title of each State in the beds of navigable and tide waters within its jurisdiction is subject to a paramount right of navigation granted to the United States for the regulation of foreign and interstate commerce, federal Commerce Clause authority does not preempt the substantial proprietary interest of a state in the control of fisheries and other natural resources within its boundaries, except to preclude state restrictions which discriminate in favor of its own citizens and against those of other states or which violate a federal statute or treaty on the subject. See *Smith v. Maryland*, 59 U.S. 71, 15 L. Ed. 269 (1855); *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877) [regarding the authority of Virginia to regulate oyster cultivation in its tidal rivers: "[T]here is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."]; *Manchester v. Massachusetts*, 139 U.S. 240, 11 S. Ct. 559, 35 L.Ed. 159 (1891); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977); note also *Moore v. Hampton Roads Sanitation*, 557 F.2d 1030 (4th Cir. 1976), cert. denied [harvesting of oysters from leases issued by Virginia is a purely local activity subject to Virginia state law, as recognized by Congress in the Submerged Lands Act] and *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984) [the federal navigational servitude under the Commerce Clause does not include public fishing rights, a matter governed by state law].

While *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 548 (1940) indicates that the Commerce Clause power of the United States over navigable waters is not limited to control for navigation and can

include such interests as flood protection, watershed development and the production of power, the express reservation of these rights in the Submerged Lands Act [see 43 U.S.C. §1311(d)], coupled with the express confirmation of the authority of the States over shell-fish cultivation and harvesting in the same Act [43 U.S.C. §1311(a)], leaves beyond question the conclusion that no individual federal fishing rights under the Commerce Clause or other provision of the United States Constitution were contemplated to exist either in 1953 or today. Thus, Section 1314 of the Act declares that the United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources* which are specifically recognized, confirmed and vested in and assigned to the respective States *and others* by Section 1311.

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cited by the Crawfishermen to suggest a Commerce Clause public fishing right, is not only distinguishable on its facts (no fishing interest at issue or considered by the Court) but its conclusion that the Commerce Clause authority extends to regulating use of private submerged riparian property *for conservation purposes* (i.e., to protect wildlife) because "the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce" has been properly criticized as perfunctory dicta made without any analysis and accordingly should be given no weight. See *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A.*, 961 F.2d 1310 at 1321 n. 8 (7th Cir. 1992). Moreover, the Commerce Clause application suggested by the Crawfishermen would completely emasculate the express provisions of the Submerged Lands Act.

Neither the Commerce Clause nor the 14th Amendment[11] of the United States Constitution confers any right upon an individual citizen to fish on privately owned subaqueous land within the boundaries of the State of Louisiana. Neither Louisiana's property law nor the use and protection by these Landowners of their private property rights violates any federal law or treaty or discriminates against citizens of another state or otherwise impairs any federal interest in interstate commerce. In fact, federal law (including Supreme Court jurisprudence) specifically sanctions the private property rights and interests of these Landowners under Louisiana state law.

5. THE RIGHT TO CRAWFISH IS A PROPERTY RIGHT INCIDENT TO THE OWNERSHIP OF THE LAND AND DOES NOT FOLLOW FROM ANY PUBLIC RIGHT OF PASSAGE ON WATERS, EVEN IF NAVIGABLE, WHICH MAY FLOW OVER PRIVATELY OWNED LAND.

The Crawfishermen's naked claim that public trust fishing rights are a protected use of navigable waters *independent of land ownership* is contradicted by the very authorities which they cite in support of their alleged rights. *Smith v. Maryland* notes that, among the possible state interests, "public trust *lands* may be used for fishing for both shell-fish [and] floating fish" and observes that "the *soil* [below the low water mark] is held by the state for the enjoyment of certain public rights, among which is the common liberty of taking fish." See also *Hardin v.*

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[11] *The Slaughterhouse Cases*, 16 Wall.36, 83 U.S.36 (1873), lend no support to the rights claimed by the Crawfishermen. The dicta cited by the Crawfishermen bears neither the meaning (i.e., "use" = "fish") nor weight (i.e., established a constitutional right to fish) ascribed by them to that decision.

Jordan and particularly *Phillips v. Mississippi*, cited to recognize a state's public trust interest *in lands beneath tidal waters* for uses not related to navigability such as *fishing*, bathing, swimming, recreation and mineral development.

Even the 1934 Michigan property law decision cited by the Crawfishermen to support the independent nature of the right to fish from the right of navigation [*Ne-Bo-Shone Association v. Hogarth*, 7 F. Supp. 885 at 889-890] supports that observation by reference to a 1914 Harvard Law Review article entitled "The Right To Take Fish and Game in Navigable Non-Tidal Waters," which affirms that the right to fish in navigable waters is properly an incident of the land ownership:

> "While no one can obtain absolute property in fish and game except by reduction to possession, and therefore their ownership while uncaptured does not go with the realty; *the right to take creatures ferae naturae*, transiently upon land, is recognized as a valuable property right incident to its ownership. So in ancient times, the right to fish in the sea was the exclusive prerogative of the King and lord of the soil; but either by Magna Charta, or by the gradual encroachment upon royal prerogative as the representative character became recognized, the King's right to the sea came to be regarded as held in trust for the public, and the right to fish became free and common to all. This right though arising independently of the public ownership of the soil, thus chanced here to be coextensive with the right of navigation. In English non-tidal streams, however, the exclusive right of fishery is in the riparian proprietor of the soil. Inasmuch as these inland waters are subject to a public easement of navigation, *it is clear that the right to hunt and fish has no connection with the right of navigation, but is an incident of the land.*

* * *

Not only is there no historical connection between the right to hunt and fish and the right of passage, but there is no basis on reason or analogy for the connection. Although other servitudes in the nature of easements may be annexed by custom or prescription to an easement of passage, the right to take fish and game cannot be thus annexed because it is not an easement but a *profit a' prendre*, which the public cannot acquire by customary or prescriptive user. Aside from annexed incidents, a public right of passage upon land includes only those rights reasonably necessary for the enjoyment of the easement. According one who uses a public way as a vantage ground for observing the training of horses in adjoining fields, . . . or shooting his game, becomes a trespasser upon the servient tenement. And one in the pretended exercise of an easement of navigation over privately owned subaqueous land, who takes ice from the surface or gravel from the bed of the stream is likewise clearly a trespasser. The argument that as fish and game have no owner, anyone has a right to take them wherever he has a right to be, is thus answerable in that the taker has no right on the highway for that purpose. On these grounds the majority of the courts have reached a result opposite to that of the principal case." See 27 Harvard Law Review, Page 750-752 (emphasis added).[12]

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[12] Some states, like Michigan, pursued a different policy. Note *Collins v. Gerhardt*, cited by the Crawfishermen, in which the Michigan Supreme Court decided "that the common law doctrine, viz., that the right of fishing in navigable waters follows ownership of the soil, does not prevail in this state." The concurring opinion in that case also indicated that, even under

In Louisiana, the right to hunt and fish has always been regarded as a property right incident to the ownership of the land. As recently affirmed by the Louisiana State Law Institute and by the Louisiana Legislature in light of the *Phillips* pronouncements, navigability – not fisheries use – has been the hallmark of Louisiana's public trust interest in its sovereignty lands since statehood, public rights to hunt and fish being limited to public lands, including navigable waterbottoms which have remained under ownership by the State of Louisiana.[13] Furthermore, the idea that public navigation and fishery rights arises from the public nature of "running water" has been considered and rejected in the state courts of Louisiana and by the Fifth Circuit. See *Brown v. Rougon*, 552 So.2d 1052 (La. App. lst Cir. 1989), writ denied (recognizing that although subject to public use, the water running naturally in a private canal does not give the public the right to navigate and fish in the canal); *Amigo Enterprises, Inc. v. Gonzales*, 581 So.2d 1082 (La. App. 4th Cir. 1991); *Dardar v. Lafourche Realty Co., Inc.*, No. 85-1015 (E.D. La. 1991), affirmed in part, vacated in part and remanded, 985 F.2d 824 at 834 (5th Cir. 1993); *People For Open Waters, Inc. v. Estate of Gray*, 643 So.2d 415 (La. App. 3rd Cir. 1994). Louisiana courts have also consistently recognized that the public at large enjoys no right of access for fishing on private land simply because that land becomes flooded by a navigable stream. See *State v. Richardson*, 72 So. 984 (La. 1916); *Warner v. Clarke*, 232

Michigan law, no public trust fishing rights affect swamplands acquired under the Swamp Lands Acts which are overflowed so as to be covered by navigable waters. Note also the *Collins* dissent. See 211 N. W. 115 at 118, 123-128.

[13] See the Louisiana State Law Institute's Advisory Legal Opinion Relative to Non-Navigable Waterbottoms, 53 La. Law Rev. 35 at 66-67 (1992); La. R.S. 9:1115.1; Hargrave, "The Public Trust Doctrine: A Plea for Precision", 53 La. Law Rev. 1535 (1993).

So.2d 99 (La. App. 2d Cir. 1970), writ denied; *Edmiston v. Wood*, 566 So.2d 673 (La. App. 2d Cir. 1990); see also La. Civil Code Article 3413; official comment (b) to La. Civil Code Article 456, as revised in 1978; Louisiana Attorney General Opinion No. 88-649; A.N. Yiannopoulos, La. Civil Law Treatise, Vol. 2, Property, §§56-61,85 (3rd Ed., 1991).

State v. Barras, 615 So.2d 285 (La. 1993), considered the validity of trespass charges brought against two members of Producers for actively conducting commercial crawfish harvesting *on lands within the presently contested area of the Atchafalaya Basin* without permit and after being orally forbidden to remain on such lands. The lands involved were flooded swamp lands, inundated by waters of the Atchafalaya River and its distributaries for up to six months of each year with depths of water in the crawfishing areas ranging from 6" to 6', *the same characteristics alleged by the Crawfishermen over the other lands in controversy in this proceeding*. The crawfishermen claimed that the lands were public lands subject to public use. The Louisiana Supreme Court affirmed the trespass convictions, properly recognizing that the area in question was backwater swamp land within the Atchafalaya River's floodplain which did not, by its mere susceptibility to crawfish activity and navigation during flood conditions, become public navigable waters or render the private property subject to public use.

The shallow depth of legal analysis and historical perspective by these Crawfishermen is perhaps best exemplified in their attack on the Louisiana Supreme Court's *Barras* decision, referring to the Court's protection of the private nature of "flooded swampland" as "semantic legerdemain." The very fact that the United States government in 1849 and 1850 authorized the grant to Louisiana of all swamp and all overflowed lands within its borders for private sale to aid the State in constructing the necessary levees and drains to reclaim such lands indicates quite clearly that neither the federal nor state sovereigns ever considered flooded swampland

to be inalienable sovereignty lands affected by any notion of public trust right or interest and that both sovereigns fully intended all rights inherent in the private ownership of such lands to pass to the purchasers thereof.

The Submerged Lands Act expressly recognizes that the use of submerged lands beneath navigable waters of the United States for crawfishing was vested either in the State of Louisiana or the private individuals in ownership of the lands or the right to fish thereon as of the effective date of that legislation, negating any notion of a paramount federal statutory, common law or constitutional right or interest in that activity. This Court emphatically stated in *Phillips* that post-statehood public trust uses of sovereignty lands and waters are matters of state law and policy subject to the constitutional powers reserved to the federal government. Both specific Congressional legislation and long-standing pronouncements of this Court affirm the propriety of the Fifth Circuit and the District Court in dismissing this complaint as a matter of federal law.

CONCLUSION

The Crawfishermen are not concerned with any obstruction of their navigation in the major navigable bayous and streams which make up the Atchafalaya River system and its distributaries in this portion of the Floodway, as no such obstruction exists nor can any be shown by them.[14] They admit that their activities take place outside the beds of these bayous and streams. In essence, these Crawfishermen are asking the federal courts to declare vast areas of privately owned swampland to be subject to public crawfishing use as a matter of federal law in derogation of the aforestated principles of Louisiana law and of the titles and ownership rights

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[14] See page 15 of the Memorandum Ruling of the District Court in this proceeding, appended to the writ petition herein.

lawfully transferred by the State of Louisiana and/or the United States government long ago to private parties.

Moreover, these Crawfishermen do not seek access to the many thousands of acres of overflowed swamp involved in this litigation for purposes of navigation as public highways in interstate commerce.[15] Only capable in part of an imperfect navigation for crawfishing uses when flooded at periods of high water, these tree-choked swamps are wholly insusceptible of use in navigation in interstate commerce in their ordinary condition. They have long been recognized as private property and were sold by the State of Louisiana and federal government as such. Accordingly, any attempt to recognize a general public right of access and use for crawfishing under the Commerce Clause of the United States Constitution would run afoul of the Fifth Amendment and amount to a taking of private property without compensation. See *Kaiser Aetna*, supra; *Vaughn*, supra; *Dardar v. Lafourche Realty*, supra. As recognized in *Kaiser Aetna*, the "right to exclude" is universally held to be a fundamental element of the right of private property, falling clearly within the category of interests that the government cannot take without compensation.

The issue of a public right to fish on privately-owned submerged land is not new. It has been raised, studied and addressed in numerous state and federal forums by legislators, legal practitioners, legal scholars and the

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[15] The Landowners will contest whether these overflowed swamp lands are navigable in fact so as to be navigable in law should trial on the merits become necessary. For purposes of this motion only, the Landowners do not raise the fact issue of navigability, since even allowing the assumption that the overflowed swamp were navigable in fact to these Crawfishermen, federal law does not recognize a crawfishing right in the public on these submerged privately owned lands.

courts, all of which have reached the same conclusion – that the District Court and the Fifth Circuit were undeniably correct in finding no basis in federal law for the rights claimed by these Crawfishermen and dismissing the action for consideration by the state courts of Louisiana based upon state law and policy applicable to this property issue, should the Crawfishermen choose to advance their state law claims to these crawfishing rights.

The decision of the Fifth Circuit in this matter is grounded in well-settled principles of law which the Fifth Circuit has properly recognized concern no issues of significant public interest. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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